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FILED

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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

DIVISION'S MEMORANDUM
IN SUPPORT OF MOTION TO
DISMISS CERTAIN CLAIMS

Docket No. 2009-019
Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through counsel hereby submits the following Memorandum in Support of the Motion to Dismiss Certain Claims.

ARGUMENT

The Division requests the Board dismiss certain claims asserted by the Petitioners for failure to state a claim upon which relief may be granted. A motion to dismiss for failure to state a claim upon which relief can be granted "admits the facts alleged in the complaint but

challenges the plaintiff's right to relief based on those facts.” *Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1230 (Utah 2004). Specifically, the Division requests the Board dismiss the following claims for failure to state a claim upon which relief may be granted:

1. The alleged deficiency in the permit application that the Division failed to consider the effect of coal haul trucks on cultural and other resources outside of the permit area including the impacts of coal haul trucks on the Panguitch National Historic District (PNHD) as set out in itemized deficiency 24 and 25 (page 13) and in the itemized Argument and Request for Relief, 7 (page 24 to 26);

2. The alleged deficiency in the permit application for failure to require an air monitoring plan that is sufficient to address the effectiveness of the proposed fugitive dust controls and failure to address the effects of mining on the visibility of night sky in violations of R645-301-423.200 as set out in itemized deficiencies numbers 26 and 27, (page 14) and itemized Argument and Request for Relief, 8 (pages 26 and 27); and

3. The alleged deficiencies in the permit application of failing to document the approval of the Division of Wildlife Resources and to include measures to monitor to limit road kill for the protection of Sage Grouse and other wildlife as alleged in itemized deficiencies numbers 28 and 29 and in itemized Argument and Request for Relief, D (pages 34 and 35).

Alleged Deficiency Related to the Effect of Coal Transportation on Cultural, Historic and Other Resources Outside of the Permit Area

Petitioners claim that the permit does not analyze the potential impacts of coal transportation through the Panguitch National Historic District (PNHD). Petitioner's Request for Agency Action and Request for a Hearing By Petitioners Utah Chapter of the Sierra Club et. al,

at p. 24-25 & p. 13, ¶ 24. Petitioners further claim that the permit is deficient because it “does not contain any data on hydrology, cultural and historic resources, or other required areas of study with respect to the portion of the potential ‘affected area’ involved in the haulage of coal by road from the permit area to the rail loading facility.” Petitioner’s Request for Agency Action and Request for a Hearing By Petitioners Utah Chapter of the Sierra Club et. al, at p. 13, ¶ 25.

The Petitioners did not identify any particular location where they claim hydrology or other resources are adversely affected by coal transportation associated with this mining operation. The Division’s argument (that follows) addressing the alleged failure to include the PNHD in the adjacent area for cultural resources also applies to the alleged failure to consider the possible impacts of coal transportation on hydrology or other resources along the public highways that may be part of the transportation route.

The Division did not include PNHD in its analysis of cultural and historic resources because the PNHD is not located in the permit area and is not located in an adjacent area for cultural and historic resources. Utah Admin. Code R645-301-411.140 requires a narrative describing the nature of cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas. Utah Admin. Code R645-100-200 defines adjacent area as “the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations.” Accordingly, an adjacent area for cultural and historic resources is an area where cultural and historic resources could *reasonably* be expected to be adversely impacted by proposed coal mining and reclamation operations.

The Panguitch National Historic District is located 30 miles away from the permit area and is not geographically adjacent to the permit area. The District comprises an area consisting of most of the land within the City of Panguitch and encompasses a variety of buildings, streets, and locations including the main route of US Highway 89. (See map Exhibit 1). Petitioners have not alleged facts to support the proposition that the cultural or historic resources of the PNHD determined according to the context in which they are located; i.e. an area of mixed use buildings along an existing four lane highway that already carries substantial car and truck traffic, could reasonably be expected to be adversely impacted by the coal mining operations. The Petitioners' simply assert, without support, that "the application contains no analysis of the amount of truck traffic . . . or the effects of such traffic on the historic district." RAA at 25. Petitioners do not indicate why they believe there is a reasonable expectation of adverse impacts that will be associated with coal haul trucks or what portion or attribute of the district will be adversely impacted due to an increase in traffic on Highway 89.

The definition of 'coal mining and reclamation operations' expressly excludes from its definition and its regulatory reach the hauling of coal on public highways. Public roads are excluded from the definition of 'affected area' in the Coal Act rules.¹ Utah Admin. Code R645-100-200. Accordingly, the 'adjacent area' as defined above, which is determined based on the potential impact from 'coal mining and reclamation operations' excludes from its reach the impacts from coal trucks on public roads. The determination of an adjacent area is limited to the

¹ The Petitioners, inaccurately citing to the CRMP, state that the transportation route is part of the "affected area." The term affected environment used in the CRMP. is based on separate standards and should not be confused with the term 'affected area' as it is defined in the Coal Act regulations which explicitly *exclude* public transportation routes from affected lands as that term is used to define coal mining operations. See Utah Admin. Code R645-200-100. In compliance with the rules, the State Historic Preservation Officer (SHPO) has reviewed and approved the permit application including the Cultural Resources Management Plan (CRMP), which identified all of the archeological and other cultural sites within the permit area and the area determined to be an adjacent area where such resources might be impacted and excluded the PNHD. Utah Admin. Code R645-301-411.142.

impacts outside of the permit area from the regulated activities at the mine site. The Town of Panguitch and the PNHD are too far removed from the regulated mining activities conducted within the permit area, for it to be reasonable for the Division to anticipate adverse impacts to the historic resources of the PNHD and include the District in the adjacent area. In fact the Petitioners do not make such a claim, the only allegation is that truck traffic associated with hauling coal to market requires this analysis. The Petitioners have cited no case in support of this interpretation of the Coal Act, and as has been demonstrated it is inconsistent with the definitions of affected area and coal mining and reclamation operations. This argument is also inconsistent the Coal Act's general method of regulation that relies on establishing baseline data, monitoring effects and requiring mitigation. There is no requirement for the application to include the coal transportation routes on public roads and no regulation of means of transporting of coal on public roads beyond the permit boundary. The proposed route was provided as incidental information and the operator is free to elect other routes or other means of transportation without amending the permit. If the Board accepts the Petitioners' argument, then the entire route (and other possible routes) from the permit boundary to the load-out could qualify as possible adjacent areas where possible impacts to cultural resource might need to be analyzed. This is not a reasonable interpretation of the language or intent of the Coal Act.

In addition, the Division correctly did not include the PNHD in the adjacent area because even if the impact from coal trucks is considered a vector for impacts from coal mining operations, there is no reasonable expectation of quantifiable adverse impacts to the PNHD from coal trucks on the public roads. At most, the possible impacts are speculative and marginal and not distinguishable from the impacts of other car and truck traffic that is legally allowed on Highway 89.

Petitioners have not provided any facts to support their claims that the PNHD may be adversely impacted. Highway 89 is not a seldom used dirt road, and the PNHD is not a fragile building or ruin unaccustomed to truck traffic that could potentially be damaged by vibration or dust. Allegations of possible damage are based in part on subjective attitudes and not on any quantifiable metric. Setting aside the difficulty inherent in measuring such impacts and the unanswered question of how the Division might require the operator to mitigate something that cannot be measured, the Division has no authority to impose regulations on a public highway. Regulation of the highways, including such restrictions as prohibiting trucks on certain roads, imposing weight restrictions, limiting the use of engine brakes, and setting speed limits is the exclusive province of city, county and state entities. The more sensible interpretation regarding the intent and application of the Coal Act is that the Division need not examine such speculative and remote types of impacts from activities associated with transportation of coal on public roads that are subject to the regulatory control of other entities.

The Petitioners seek to impose a NEPA type of analysis on the Division, requiring an examination of *all possible* impacts from the proposed project. The Division is not required to do a NEPA type analysis but only to consider the impacts to certain protected resources within the permit area and within certain other adjacent areas when it is reasonable to expect an adverse impact to a protected resource determined according to the context in which they are located. The logic of the NEPA analysis urged by Petitioners would also result in requiring an analysis for any historic, hydrologic and other resources along this and all other possible routes. If this were the intent of the Coal Act, the regulations would require the designation of potential routes and means of haulage, and the Division would have been given power and standards to govern

truck traffic on public roads instead of being given an explicit exclusion of such activity from its regulatory authority.

Alleged Deficiencies Related to Air Quality Monitoring and Night Sky Visibility.

The Board should dismiss Petitioners' claims related to the Air Pollution Control Plan for failure to state a claim upon which relief can be granted. Petitioners claim that the air pollution plan included in the permit application is incomplete because 1) the dust control plan includes a method for monitoring fugitive dust that is designed for plumes from stationary sources (EPA method 9), and 2) the dust control plan that does not address the impacts of mining on clarity of the night sky. Petitioner's Request for Agency Action and Request for a Hearing By Petitioners Utah Chapter of the Sierra Club *et. al*, at p. 14 ¶¶ 26 and 27, and p. 26.

First, taking the factual allegation that the dust control plan employs EPA method 9 as true, Petitioners have failed to state a claim upon which relief may be granted and dismissal of this claim is therefore appropriate. The applicable regulations for air quality provide for the following: (1) coal mining and reclamation activities must be conducted in compliance with the Clean Air Act and any other applicable Utah or federal statutes and regulations containing air quality standards (Utah Admin. Code R645-301-421), (2) the application must contain a description of coordination and compliance efforts which have been undertaken by the applicant with the Utah Bureau of Air Quality [the Utah Division of Air Quality ("DAQ")] (Utah Admin. Code R645-301-422), and (3) for all coal mining and reclamation activities with projected production rates exceeding 1,000,000 tons of coal per year, the application must contain an air pollution control plan that includes a plan for fugitive dust control practices and an air quality monitoring program to provide sufficient data to evaluate the effectiveness of the proposed

fugitive dust control practices to comply with federal and Utah air quality standards. (Utah Admin. Code R645-301-423 through 423.200)

The permit application complies fully with these regulations. The coal mining and reclamation operations are required to comply with the requirements of the Clean Air Act and state or federal air quality standards. It is undisputed that the application contains a description of coordination and compliance efforts with DAQ. Finally, DAQ found the use of EPA method 9 acceptable, and the DAQ is required to evaluate the dust control plan prior to issuance of air quality permits.

Second, taking the factual allegation that the dust control plan does not consider the impacts of mining operations on night sky clarity as true, Petitioners have again failed to state a claim upon which relief can be granted and dismissal of this claim is therefore appropriate. There is no legal requirement that the air quality regulations or any requirement of the permit application address the impact of the proposed mining operations on night sky clarity. Neither the Clean Air Act nor the Utah Coal Act requires a permit application contain baseline data, or any analysis of the impacts of mining activities on the clarity of the night sky. Once again, the Petitioners are trying to impose a NEPA type analysis of all possible impacts of mining on the surrounding area as part of the Division's regulatory obligations. In addition, the Petitioners are by this allegation trying to create public alarm that is unjustified by the facts. The mine is located more than 26 miles from the facilities at Bryce Canyon National Park and the potential for impact to the visibility of the night sky at the Park is at most speculative.

Alleged Deficiencies Relating to Approval of the Division of Wildlife Resources and Measures to Monitor or Limit Road Kill for the Protection of Sage Grouse and Other Wildlife

The Board should dismiss Petitioners' claim related to sage grouse and wildlife protections for failure to state a claim upon which relief can be granted. The Petitioners allege that the permit application does not contain documentation establishing that the Utah Division of Wildlife Resources ("DWR") has "approved" ACD's fish and wildlife protection plan and does not include a specification of measures that ACD will undertake to monitor or limit road-kill of sage grouse or other wildlife. Petitioner's Request for Agency Action and Request for a Hearing By Petitioners Utah Chapter of the Sierra Club et. al, at p. 14 ¶¶ 28 and 29, and p. 30-31.

Taking the factual allegations related to wildlife including sage grouse as true, Petitioners have failed to state a claim upon which relief may be granted and dismissal of these claims is appropriate. Approval of a fish and wildlife protection plan by DWR is not legally required by the Coal Act and regulations. In support of the argument that the wildlife agency must approve the wildlife protection plan, Petitioners cite a requirement that the Division determine the scope and level of detail of fish and wildlife information "in consultation with state and federal agencies with responsibilities for fish and wildlife." Utah Admin. Code R645-301- 322.100 ("The scope and level of detail for such information will be determined by the Division in consultation with state and federal agencies with responsibilities for fish and wildlife and will be sufficient to design the protection and enhancement plan required under R645-301-333."). This provision does not require consent or approval. The Petitioners do not cite any decision or regulation to support the claim that the language requires approval. The Board should interpret the statute according to its plain meaning. There is no factual dispute that the Division consulted

with DWR as required. The consultation has been documented in Appendix 3-5 of the permit application.

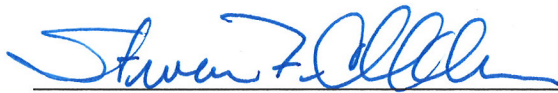
There is also no legal requirement that the permit application contain measures to monitor or limit road-kill of sage grouse or other wildlife. The permit application does contain a wildlife mitigation plan for sage grouse as required by the regulations. Utah Admin. Code R645-301-330 and 358. Contrary to the Petitioners' allegations, the plan does include actions to monitor and reduce road kill. Volume 2, Chapter 3, p. 3-54, and Appendix 3-5. The petitioners have alleged no other deficiency in the Sage Grouse protection plan. The Division has fully complied with the regulation cited by the Petitioners, Utah Admin. Code R645-301-330 ("Each application will contain a plan for protection of vegetation, fish, and wildlife resources throughout the life of the mine"). The Board should dismiss the Petitioners' claims that there is no DWR approval of the wildlife protection plan and no road-kill monitoring and prevention measures in the plan.

CONCLUSION

The Board should dismiss Petitioners' claims that the Division failed to consider the impacts from coal haul trucks on historic values in the City of Panguitch, failed to consider the effects of the mining operations on fugitive dust and the clarity of the night sky, and failed to obtain the approval of the DWR and to protect Sage Grouse and other wildlife. These claims are not based on requirements of the Coal Act, but are based on an erroneous view that the Division is required, before issuing a permit, to investigate and protect the public and environment from all possible contingencies. The Petitioners, by their claims, suggest that the Division is required demonstrate that they have eliminated all concerns with regard to these emotional issues, yet Petitioners have not provided any evidence that there will be harm to the cultural resources in

Panguitch or to the clarity of the night sky Furthermore, Petitioners falsely claim that the plan for the protection of sage grouse requires DWR approval. These claims should not be part of the hearing and should be dismissed. The hearing should be limited to grounded claims based on alleged deficiencies to comply with requirements for a permit that are contained in the Coal Act and its regulations.

Respectfully submitted this 12th day of January, 2010

A handwritten signature in blue ink, appearing to read "Steven F. Alder", written over a horizontal line.

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Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing DIVISION'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CERTAIN CLAIMS for Docket No. 2009-019, Cause No. C0250005 to be mailed with postage prepaid, this 14th day of January, 2010, to the following:

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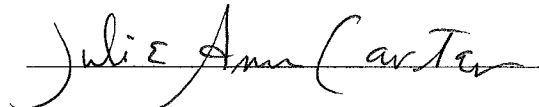
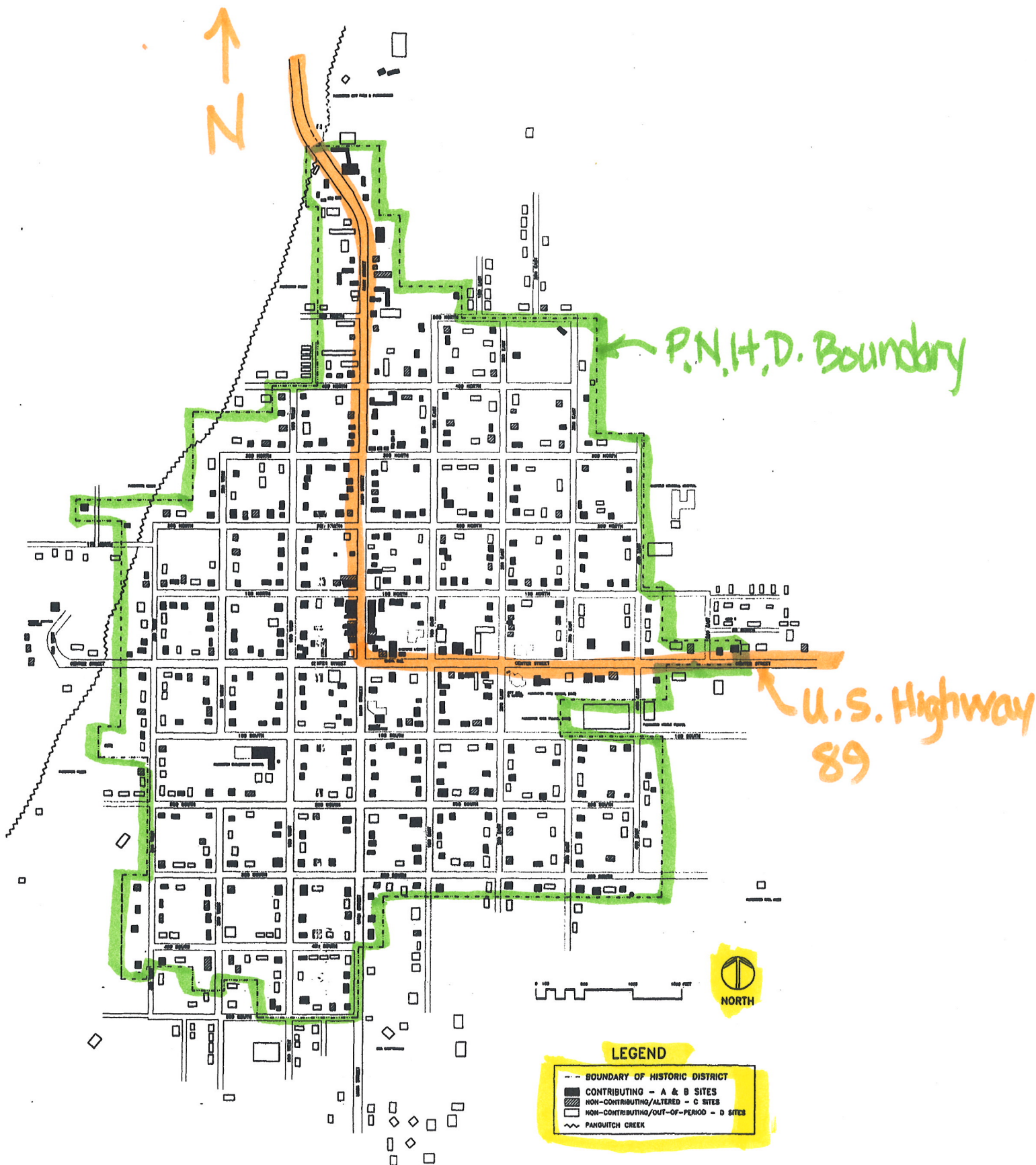
A handwritten signature in cursive script that reads "Julie Ann Carter". The signature is written in dark ink and is positioned in the lower right area of the document.

EXHIBIT 1



PANGUITCH HISTORIC DISTRICT
PANGUITCH, GARFIELD COUNTY, UTAH 2006